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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 747

ATHOL HORNE,

Petitioner,

v.

CLIFFORD S. WOOLEVER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Athol Horne prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered on December 16, 1959, affirming the judgment of the Court of Common Pleas and Court of Appeals of Lucas County, Ohio, dismissing plaintiff's petition on the pleadings.

OPINION BELOW.

The opinion of the Ohio Supreme Court is reported as *Horne v. Woolever*, 170 O. S. 178; 163 N. E. (2d) 378 (appendix p. 7).

STATEMENT OF THE CASE.

Petitioner filed this action in the Common Pleas Court of Lucas County to recover damages from respondent because of respondent's negligence in a head-on automobile collision between automobiles operated by petitioner and respondent.

Respondent filed an answer alleging that petitioner's action was barred by reason of a prior suit between the

parties in which respondent had sued petitioner for damages resulting from the same accident. Respondent alleged that he had filed suit against petitioner in the Common Pleas Court of Lucas County; that petitioner removed said suit to the federal court by reason of diversity of citizenship; that petitioner filed an answer in said suit which in effect was a general denial and did not contain any counterclaim against respondent; and that said suit was dismissed with prejudice upon payment of $25,000 by petitioner to respondent, which action was taken subsequent to the filing of the present suit.

Respondent specifically pleaded the provisions of Rule 13(a), and alleged that under Rule 13(a) petitioner was obliged to file a counterclaim in the prior suit rather than a separate suit, and because of his failure to file a counterclaim in the prior suit that petitioner was barred from asserting the claim in the present suit.

Petitioner demurred to this portion of the answer. The Common Pleas Court overruled the demurrer and entered judgment dismissing the petition, and this judgment was affirmed by the Court of Appeals and the Supreme Court of Ohio.

JURISDICTION.

Jurisdiction is conferred upon this Court to hear this case by 28 U. S. C. Section 1257(3), since the Ohio Courts interpreted Rule 13(a) of the Federal Rules of Civil Procedure as preventing recovery by plaintiff in this action. This Court has on many occasions reviewed cases decided by the highest state court which have considered the effect of a judgment in a federal court proceeding as a bar in a subsequent proceeding in a state court. *Dupasseur v. Rochereau*, 21 Wall. 130; *Deposit Bank v. Frankfort*, 191 U. S. 499; *Virginia Carolina Chemical Co. v. Kirven*, 215

U. S. 252; *Stoll v. Gottlieb*, 305 U. S. 165; *Titus v. Wallick*, 306 U. S. 282; *Toucey v. N. Y. Life Insurance Co.*, 314 U. S. 118.

QUESTION FOR REVIEW.

The question presented in this petition for certiorari is whether Rule 13(a) of the Federal Rules of Civil Procedure requires a defendant in a diversity case to assert any counterclaims he may have arising out of the same transaction, although the defendant in a proceeding in the State Court is not required to assert a counterclaim but may proceed by a separate action.

STATUTES INVOLVED.

Rule 13(a) reads as follows:

> "'(a) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.'"

REASONS FOR GRANTING THE WRIT.

This case presents an important aspect of the rule announced in *Erie Railroad v. Tompkins*, 304 U. S. 67, that a federal court sitting in a diversity case should apply the same substantive law as a state court.

It is well settled that where the provisions of the Federal Rules of Civil Procedure conflict with the substantive law of the state, a federal court in a diversity case should

follow the law of the state rather than the Federal Rules. *Guaranty Trust Co. v. York*, 326 U. S. 99; *Cities Service Co. v. Dunlap*, 308 U. S. 208; *Klaxton Co. v. Stentor Co.*, 313 U. S. 487; *Palmer v. Hoffman*, 318 U. S. 109 and see *Moore's Federal Practice*, Vol. 1, p. 3, 501 *et seq.*

The Ohio courts believed that they were obligated by Rule 13(a) to modify Ohio's substantive law of res judicata, even though it is clear that under Ohio law a counterclaim is permissive, not compulsory. See Section 2309.35 of the Revised Code of Ohio, cited in footnote 4 of the opinion of the court below. In *Hayhurst v. Embrey* (Ohio App.) 65 N. E. 2d 660 an Ohio court sustained a demurrer to an answer identical to the one in our case. The Ohio court felt compelled by the rule to change its substantive law to accord with those states which have copied the Federal rule into their state law. (See cases listed in footnote 6 of Ohio Supreme Court opinion.)

The question of the effect which a state court is required to give to Rule 13(a) in determining whether an action is barred by reason of a prior suit in which no counterclaim was filed is an important question and apparently has not been considered by any previous decision, state or federal. This question is a matter of substantial importance in the approximately forty states such as Ohio which follow the permissive counterclaim rule. The matter should be considered and decided by this Court.

Petitioner submits that the decision of the court below was based upon an erroneous interpretation of Rule 13(a), and should be reversed, since under the ruling below the effect of a prior federal court judgment in a diversity case has a quite different substantive effect from a similar judgment of a state court. Such an interpretation is contrary to the established policy reflected in *Erie Railroad v. Tompkins* and the many succeeding cases.

No federal question would be raised if Ohio changed its decisional law so as to make all counterclaims compulsory, as contemplated by Rule 13(a). The decision below based its decision solely upon an erroneous interpretation of Rule 13(a), since it did not purport to change the rule with respect to a prior judgment in a state court.

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted,

THOMAS F. BUTLER AND
WILBUR C. JACOBS, *of Counsel*,
MARSHALL, MELHORN, BLOCH & BELT,
Attorneys for Petitioner.

APPENDIX A.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO.

Dec. 16, 1959:

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant, his costs herein expended taxed at $_____.

ORDERED, That a special mandate be sent to the Court of Common Pleas of Lucas County, to carry this Judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals, of Lucas County, "for entry."

APPENDIX B.

OPINION OF THE SUPREME COURT OF OHIO.

Plaintiff instituted this action in the Common Pleas Court of Lucas County by filing a petition against the defendant to recover damages of $65,000 on account of personal injuries resulting from a collision in April 1956 between a vehicle operated by plaintiff and one operated by defendant.

On March 17, 1958, defendant filed his answer to that petition. The second defense of that answer alleges that, in February 1957, defendant sued plaintiff in the Common Pleas Court of Lucas County to recover damages in the amount of $150,000 resulting from the foregoing collision; that plaintiff filed a petition for removal of that action to the United States District Court for the Northern District of Ohio, Western Division, on the ground of diversity of citizenship, and, as a result, the defendant's action against the plaintiff was removed to that federal court; that, thereafter, plaintiff filed in that United States District Court an answer to the foregoing petition of the defendant, which answer was in effect a general denial which did not even allege negligence of the defendant; that, subsequently in August 1957, plaintiff brought the instant action against defendant in the Common Pleas Court of Lucas County to recover his damages resulting from the collision; and that in March 1958 the plaintiff paid $25,000 to settle the claims of defendant and his wife and the following order was made by the United States District Court in the foregoing action by the defendant against the plaintiff which was then pending in that court:

> "We, the attorneys for the respective parties, do hereby stipulate that this action may be dismissed with prejudice at plaintiff's costs. Cost bills and docket fees are waived by both parties.

"And that the court may enter an order accordingly, notice by the clerk being hereby waived.

"* * * [Signatures of attorneys for both parties]

"It is so ordered: * * * [signed by U. S. District Judge]"

So far as pertinent, Rule 13 of the Federal Rules of Civil Procedure provides:

"(a) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

On May 1, 1958, after the rule day for filing of a reply, defendant filed a motion for judgment on the pleadings.

On May 2, 1958, with leave of court, plaintiff filed a reply instanter to the first defense of defendant's answer but this reply does not purport to deny any of the allegations of the second defense of that answer; and, at the same time, plaintiff filed a demurrer to that second defense.

Thereafter, the Common Pleas Court overruled that demurrer, granted defendant's motion and rendered judgment for defendant.

On appeal to the Court of Appeals, that judgment was affirmed.

The cause is now before this Court on appeal from the judgment of the Court of Appeals, pursuant to allowance of plaintiff's motion to certify the record.

Messrs. Marshall, Melhorn, Bloch & Belt and *Mr. Wilbur C. Jacobs, for appellant.*

Messrs. Ritter, Boesel & Holden, for appellee.

TAFT, J. The principal question to be decided is whether, as the trial court held, the judgment of dismissal "with prejudice" in the federal court barred as *res adjudicata* the cause of action set forth in plaintiff's petition.[1]

The holding of the trial court, that was affirmed by the Court of Appeals, was based upon the conclusion that the judgment of dismissal by the federal court was a bar, as *res adjudicata*, to the present action, and not that such judgment necessarily represents a determination of any decisive issue in the instant case in such a way that that judgment would operate as an estoppel against assertion of the cause of action that is asserted in the instant action.[2]

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[1] Although the second defense of defendant's answer alleges that plaintiff paid defendant and his wife $25,000 in settlement of their claims and took "a full, complete and absolute release of all claims" from defendant and his wife, there are no allegations that any release was given by plaintiff. However, it is reasonably arguable, although this Court expresses no opinion with respect thereto, that, because of the provisions of Section 2309.19, Revised Code, such a settlement of defendant's claim for damages arising from this collision, in the absence of provisions in the release reserving to plaintiff a right to sue defendant, would represent a settlement of any claim of plaintiff against defendant with respect to damages on account of the same collision. Section 2309.19, Revised Code, reads in part:

"When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up * * *, the two demands must be deemed compensated so far as they equal each other."

[2] See paragraph two of syllabus of *State, ex rel. Ohio Water Service Co., v. Mahoning Valley Sanitary District* (1959), 169 Ohio St., 31, 157 N. E. (2d), 116.

In order for a judgment to so bar the subsequent assertion of a cause of action as *res adjudicata*, such judgment must have been rendered in an action based upon the same cause of action between the same parties or their privies.[3] The judgment of dismissal of the federal court was admittedly rendered in an action between the same parties.

Where Rule 13 of the Federal Rules of Civil Procedure or a similar applicable rule or statute requires a defendant to assert a claim that such defendant has as a counterclaim in an action,[4] such rule or statute has the effect of making such action an action based upon not only the cause of action asserted in the petition but also the cause of action that should have been asserted by way of counterclaim.[5]

As a result, a judgment on the merits in that action will bar, as *res adjudicata*, a cause of action that should have been asserted therein by way of counterclaim, even though such cause of action was not so asserted.[6]

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[3] *State, ex rel. Ohio Water Service Co. v. Mahoning Valley Sanitary District*, supra, note 2, paragraph one of syllabus.

[4] In Ohio, there is no requirement for compulsory counterclaims comparable with that provided for by Rule 13. See Section 2309.35, Revised Code.

[5] *United States v. Eastport Steamship Corp.* (CCA2-1958), 255 F. (2d), 795 ("the compulsory counterclaim rule requires that once the action was commenced" in a court having such applicable rule "that court was the only proper forum for the adjudication of any claims by the" party sued "arising out of the transaction or occurrence that was the subject matter of" the "petition" of the party suing).

[6] *Comer v. Fistere* (Mun. CA, DC-1954), 103 A. (2d), 206. Annotation 22 A. L. R. (2d), 621, 627. See *Switzer Bros., Inc., v. Locklin* (CCA7-1953), 207 F. (2d), 483. *Ake v. Chancey* (CCA5-1945), 149 F. (2d), 310. *Brinkmann v. Common School Dist.* (Mo. —1953), 255 S. W. (2d), 770. *In re Estate of Hoelscher* (1958), 249 Iowa, 444, 87 N. W. (2d), 446. *Flickinger v. Swedlow En-*

(Continued on following page.)

Generally, a consent judgment operates as *res adjudicata* to the same extent as a judgment on the merits.[7]

The term "with prejudice" is the converse of "without prejudice"; and, where a party to an action consents to a judgment of dismissal "with prejudice," such judgment concludes the rights which he did assert or should have asserted therein to the same extent as they would have been concluded if the action had been prosecuted to a final adjudication against those rights.[8]

Thus, in an instance where Rule 13 of the Federal Rules of Civil Procedure or a similar applicable rule or statute requires a defendant to assert a claim that such defendant has as a counterclaim in an action and he does not assert it, a consent judgment dismissing the action with prejudice will bar as *res adjudicata* assertion of that claim in any subsequent action.[9]

(Continued from preceding page.)

gineering Co., Inc. (1955), 45 Cal. (2d), 388, 289 P. (2d), 214. 3 Moore's Federal Practice (2 Ed., 1958 Supp.), 28, Section 13.12. Cf. *Virginia-Carolina Chemical Co. v. Kirven* (1909), 215 U. S., 252, 54 L. Ed., 179, 30 S. Ct., 78, and *Grodsky v. Sipe* (1940), 30 F. Supp., 656, in each of which, in the jurisdiction whose judgment was involved, there was no applicable rule or statutory provision for compulsory counterclaims such as that set forth in Rule 13 of the Federal Rules of Civil Procedure.

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[7] *Lawlor v. National Screen Service Corp.* (CCA3-1954), 211 F. (2d), 934. See *United States v. Eastport Steamship Corp., supra*, note 5, annotation 2 A. L. R. (2d), 514, 521, annotation 97 L. Ed., 1188, 1191.

[8] *Esquire, Inc. v. Varga Enterprises, Inc.* (CCA9-50), 185 F. (2d), 14. *Cleveland v. Higgins, Collector, Internal Revenue* (CCA2-1945), 148 F. (2d), 722. *Burns v. Fincke* (CCA, DC, 1952), 197 F. (2d), 165. 17 American Jurisprudence, 175, Section 106. See Section 2323.05, Revised Code, specifying five situations in which "an action may be dismissed without prejudice to a future action" and stating that "in all other cases the decision must be on the merits."

[9] *Keller v. Keklikian* (1951), 362 Mo., 919, 244 S. W. (2d), 1001.

From the words of Rule 13 of the Federal Rules of Civil Procedure, it is apparent that, in an action in a federal court for personal injuries resulting from an automobile collision, that rule requires the party sued to assert as a counterclaim any cause of action that he may have, when he serves his answer, against the party suing for damages resulting from that collision, unless that cause of action of the party sued was the subject of another pending action at the time of commencement of such federal court action. Since such a cause of action or "claim" of the party sued arises out of the same collision as does the cause of action of the party suing, it obviously arises out of the same "occurrence, that is the subject matter of the * * * claim" of the party suing. Also, such a claim of the party sued "does not require for its adjudication the presence of" anyone other than the party suing. Plaintiff did not even institute the instant case until after filing his answer in defendant's federal court suit. It is apparent therefore that the cause of action set forth in plaintiff's petition is one that Rule 13 would have required plaintiff to assert as a counterclaim in defendant's federal court action if that action had originally been instituted in the federal court.

Rule 81 of the Federal Rules of Civil Procedure specifically provides that those "rules apply to civil actions removed to the United States District Courts from the state courts and govern procedure after removal"; and that "in a removed action in which the defendant has not answered, he shall answer and present the other defenses or objections available to him under these rules * * * after * * * removal." The answer in defendant's federal court action against the plaintiff was not filed until after the action had been removed to the federal court.

To the extent to which a judgment of a federal court operates as *res adjudicata* in that court, it operates as *res adjudicata* in the courts of this state.[10]

Plaintiff complains further because the Common Pleas Court, after overruling plaintiff's demurrer, "refused to permit the filing of a reply."

On May 2, 1958, after defendant had filed his motion for judgment on the pleadings and at a time after the rule day for filing a reply, plaintiff, with leave of court, did file a reply instanter, but that reply does not purport to deny any allegations of defendant's answer setting forth the federal court judgment as a bar to assertion of plaintiff's cause of action in the instant case. Instead, plaintiff at that time, with leave of court, filed a demurrer with respect to those allegations. There is nothing in the record that indicates any attempt by plaintiff, after that demurrer was overruled and defendant's motion for judgment on the pleadings was sustained, to secure leave to file any further reply. It is apparent therefore that the Common Pleas Court could not have refused to permit plaintiff to file such a reply because plaintiff did not even request an opportunity to do so.

Judgment affirmed.

WEYGANDT, C.J., ZIMMERMAN, MATTHIAS, BELL, HERBERT and PECK, JJ., concur.

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[10] *Deposit Bank v. Frankfort* (1903), 191 U. S., 499, 48 L. Ed., 276, 24 S. Ct., 154. 54 American Jurisprudence, 678, Section 19. Annotation 2 A. L. R. (2d), 514, 530. Cf. *De Carlucci v. Brasley* (1951), 16 N. J. Sup., 48, 83 A. (2d), 823, where a direct attack on the judgment was made in the proceeding in which it had been rendered, instead of a collateral attack in another court as in the instant case, and *Perry v. Faulkner* (1954), 98 N. H., 474, 102 A. (2d), 908 ("in order that the plaintiff here may be free to sustain her action she should first proceed by motion in the Superior Court to vacate the judgment against her in" the action brought by defendant against plaintiff to recover for plaintiff's damages from the same collision).